Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT THURLWELL, an individual,

Petitioner,

vs.

WALT DISNEY PICTURES and TELEVISION, INC., A Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Plaintiff, the employee in a hybrid Labor Management Relations action, lose his breach of collective bargaining agreement claim against his employer, when he prevailed against his union and was awarded damages for the union's breach of the duty of fair representation?

PARTIES TO THE PROCEEDING

Petitioner

Robert Thurlwell, an individual.

Respondents

Walt Disney Pictures and Television, Inc., a wholly owned subsidiary of the Walt Disney Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Thurlwell respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (March 29, 2001), and on rehearing (June 22, 2001).

OPINIONS BELOW

The opinions below were unpublished. The opinions of the Ninth Circuit are reproduced in Appendices 1 and 2 to this petition, and the judgment of the United States District Court for the Central District of California is reproduced in Appendix 3, of this petition. The opinion of the Ninth Circuit affirmed the judgment of the United States District Court for the Central District of California. (App. 3.)

STATEMENT OF JURISDICTION

The decision of the Ninth Circuit Court of Appeals, which forms the basis of this petition for Writ of Certiorari was entered on *March 29, 2001.* (App. 1) A Petition for Rehearing and Suggestion for Rehearing *En Banc* was timely filed pursuant to an extension granted by the clerk of the Ninth Circuit, and said petition was denied on *June 22, 2001.* (App. 2) This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing.

United States Supreme Court has jurisdiction to review this case on petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

29 U.S.C. § 185 provides in part:

> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> **(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments**
>
> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities effect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States.

STATEMENT OF THE CASE

Robert Thurlwell was an employee of Walt Disney Pictures and Television Company for thirty years, from July 1965 through July 1995. On August 6, 1995, Walt Disney Pictures and Television, hereinafter "Disney", terminated Thurlwell's employment on the grounds that Thurlwell verbally informed Disney's head of production services that he was resigning.

After unsuccessfully seeking representation from his Union, Thurlwell filed a complaint against Disney and the International Association of Theatrical Stage Employees, I.A.T.S.E., Local 727, alleging inter alia that his termination was a breach of the collective bargaining agreement.

The United States District Court had jurisdiction over the original action pursuant to 28 U.S.C. § 1331 and 1337, because the case presented a federal question under the Labor Management Relations Act.

Disney and I.A.T.S.E., Local 727 filed summary judgment motions in March 1997. The District Court granted their motions, and Thurlwell took a timely appeal from the grant of the summary judgment motions.

On December 17, 1998, the Ninth Circuit reversed the summary judgments on the issue of Thurlwell's termination and remanded the case for trial on that issue. Trial commenced on July 13, 1999, and over Thurlwell's objections, the District Court issued a special verdict form that required the jurors to answer the following questions:

> 1. Do you find from a preponderance of the evidence that I.A.T.S.E. Local 727 (the

> "Union") breached its duty of fair representation to act on behalf of plaintiff regarding plaintiff's claim against Walt Disney Pictures and Television?

If your answer to Question 1 is "Yes", continue by answering Question 2. If your answer to Question 1 is "No," continue by dating, signing and returning this form.

> 2. Do you find from a preponderance of the evidence that plaintiff did not resign his employment at Walt Disney Pictures and Television to work on "Beverly Hills 90210"?

If your answer to Question 2 is "Yes" continue by answering Question 3. If your answer to Question 2 is "No," continue by dating, signing and returning this form.

> 3. Do you find from a preponderance of the evidence that plaintiff received authorization from Walt Disney Pictures and Television to take a leave of absence in order to work full time on Beverly Hills 90210 without losing his Disney Seniority?

If your answer to Question 3 is "Yes," continue by answering Question 4. If your answer to Question 3 is "No," continue by dating, signing and returning this form.

The jury respectively found that I.A.T.S.E. Local 727 breached the duty of fair representation it owed Thurlwell; the jury further held that Thurlwell did not resign his employment, but also found that Thurlwell did not take a leave of absence to work full time on Beverly Hills 90210.

The District Court entered judgment against the Union and awarded attorney's fee damages to Robert Thurlwell for the Union's breach of the duty of fair representation.

However, the District Court denied Thurlwell judgment against Disney and awarded costs to Disney.

Thurlwell appealed the District Court's denial of judgment against Disney, and I.A.T.S.E. Local 727 appealed the damages awarded to Robert Thurlwell. Prior to briefing, I.A.T.S.E. Local 727 withdrew its appeal, and Thurlwell's appeal proceeded against Disney.

Notwithstanding long settled precedents of this Court and several Federal Circuits, a Ninth Circuit panel affirmed the District Court judgment, which held that an employer and its employee both prevailed in a hybrid Labor Management Relations action, where the employer was successful on the claim for breach of the collective bargaining agreement, and the employee prevailed on his claim for breach of the duty of fair representation.

REASONS FOR GRANTING THE WRIT

THE COURTS BELOW MISAPPLIED *DELCOSTELLO v. INTERNATIONAL BROTH. OF TEAMSTERS* [462 U.S. 151, 103 S.CT. 2281], WHICH UNAMBIGUOUSLY HELD THAT A PLAINTIFF IN A HYBRID LABOR MANAGEMENT RELATIONS ACT MUST PREVAIL AGAINST BOTH DEFENDANTS OR NONE AT ALL

In *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), this Court held that an employee who brought suit against his

Union for breach of the Union's duty of fair representation, must also prove that his employer breached the collective bargaining agreement before he can prevail. (462 U.S., p.164-165.)[1]

The proof required against the union and that required against the employer were inextricably interdependent in these hybrid actions.[2] (*Id.*).

This precept of inextricable interdependence in hybrid actions came into being over a long series of precedents in which this Court reasoned that it defeats the primary purpose of the Labor Management Relations Act to have the employer prevail on an employee's claim of breach of the collective bargaining agreement in instances when the Union had failed in its duty of fair representation, and vice versa. (See *United Parcel Service, Inc. v. Mitchell* 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981); *Vaca v. Sipes* 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967))

---

[1] "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Mitchell, supra,* at 66-67 (Stewart, J., concurring in judgment), quoting *Hines, supra,* at 570-571.

DelCostello v. International Broth. Of Teamsters, supra, 462 U.S. at 164-165, 103 S.Ct. at 2291.

[2] The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

DelCostello v. Teamsters, supra, 462 U.S. at 165, 103 S.Ct. at 2291.

In *Vaca v. Sipes*, supra, for instance, this Court acknowledged that the duty of fair representation was implied in the National Labor Relations Act because the act stripped union members of the ability to bargain and protect their interests individually. "In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization . . . ". (*Id.*) Thurlwell maintains that a decision, which holds the Union in breach of the duty of fair representation, but allows the employer to prevail on the breach of collective bargaining agreement claim, is a throwback to the very system where the union member is utterly without union representation in the first place. It is an application of the NLRA without the implied duty of fair representation as stated in *Vaca v. Sipes*, supra.

Thus, even before this Court had the opportunity to clarify the hybrid nature of LMRA actions in *DelCostello v. International Broth. Of Teamsters*, supra, it had long since recognized the inequity in allowing an employer to prevail in a breach of collective bargaining agreement action where the Union had clearly breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976)

In *Hines v. Anchor Motor Freight, Inc.*, supra, the Union breached its duty of fair representation by failing to properly investigate and prosecute its members' claims of wrongful termination during arbitration against the employer. However, the employer was not complicit in this violation by the Union. The employer in fact acted fairly throughout the process, presenting the evidence upon which it relied to make the disputed decision, and

therefore, claimed it should not be required to relitigate the favorable ruling it received from the arbitrator.

This Court reasoned that the integrity of the arbitral process could have been undermined by the union's breach of its duty of fair representation. (*Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554, 567, 96 S.Ct. 1049, 1058, 47 L.Ed.2d 231.) Therefore, the arbitrator's ruling for the employer was vacated.

In the case at bar, it must be similarly true that the integrity of the legal process was undermined because the evidence that would otherwise have come from the Union to prove the breach of the collective bargaining agreement was not forthcoming since the Union had breached its duty of fair representation. This is more so on the facts of this case, because when the Jury found that Thurlwell did not resign as originally claimed by Disney, they essentially were saying that Disney breached the collective bargaining agreement in that regard.

THE NINTH CIRCUIT DECISION IS INCONSISTENT WITH THE DECISIONS OF SECOND, SIXTH, SEVENTH AND EIGHTH CIRCUITS ON THE SAME ISSUE AND LAW.

The decision of the Ninth Circuit in affirming this judgment in favor of Disney, notwithstanding the award of damages against the Union was also inconsistent with opinions in almost all other Circuits of the United States Courts of Appeals, which continue to follow *DelCostello*, supra.

In *Livingstone v. Schnuck Market, Inc.*, 950 F.2d 579 (8th Cir. 1991), the Eighth Circuit Court of Appeals followed

DelCostello, supra, in holding that an employee's claim against his union and his employer are "inextricably intertwined" regardless of "whether the employee sues the employer, the union, or both." (950 F.2d 582.)

In *White v. White Rose Food*, 237 F.3d 173 (2nd Cir. 2001), the Second Circuit Court of Appeals also held that an employee must establish that his Union breached its duty of fair representation, before he may prevail against his employer.

In *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238 (7th Cir. 1997), the Seventh Circuit held that an employee's claim against his Union and his claim against his employer are interlocked: "neither claim is viable if the other fails." Quoting *White v. General Motors*, 1 F.3d 593, 595 (7th Cir. 1993).

Similarly, in *Roeder v. American Postal Workers Union, AFL-CIO*, 180 F.3d 733 (6th Cir. 1999), the Sixth Circuit held an employee's claim against his employer for breach of the collective bargaining agreement was futile if his claim against his Union had no merit.

In light of the foregoing decisions from other Circuits, clearly following the lead of this Court in *DelCostello*, supra, the Ninth Circuit, at least, should have addressed the inconsistency of the District Court decision with the settled elements of a hybrid action. However, it not only failed to do so, but went further to strengthen the resolve of District Courts to deviate from such settled precepts of this Court, by stating that the District Court had the Circuit's mandate to do so.

One troubling aspect of the decision affirming this District Court's dual judgment in this hybrid labor management relations action was the fact that the second breach of contract question on which the judgment relied, was not in itself a breach of the collective bargaining agreement. Both Disney and Fox Television, which produces "Beverly Hills 90210", were parties to the collective bargaining agreement that formed the basis of this action, and in it they were referred to as producers. Consequently, the collective bargaining agreement established a set of procedures to be followed if an employee of one producer accepted a temporary position with another producer, also a party to the collective bargaining agreement.

Therefore, under the collective bargaining agreement, mere acceptance of a position offered by another producer was not a breach of the collective bargaining agreement and did not excuse wrongful termination by the employer.

Thurlwell maintains that it was in recognition of this fact that the District Court awarded damages against the Union. However, having done so, the law and all related precedent required the District Court to enter judgment against Disney as well.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse the judgment of the District Court.

Date: September 19, 2001

Respectively submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. WILLS, an individual,

Plaintiff,

and

ROBERT THURLWELL, an individual,

Plaintiff-Appellant,

v.

WALT DISNEY PICTURES AND TELEVISION, a corporation; INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, LOCAL 727 (MOTION PICTURE CRAFT SERVICES), an organization,

Defendants-Appellees,

and

WAYNE METCALF, an individual,; ROGER SHOOKS, an individual,

Defendants.

Nos. 99-56774
99-56944

D.C. No.
CV 95-5716-DT

MEMORANDUM*

(Filed
March 29, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Central District of California
Dickran Tevrizian, District Judge, Presiding

Argued and Submitted March 7, 2001
Pasadena, California

Before: KOZINSKI and TALLMAN, Circuit Judges, and FOGEL, District Judge**

The district court did not exceed the scope of our mandate in Thurlwell's prior appeal*** by submitting special verdict question number three (3) to the jury. We remanded for trial Thurlwell's claim that Disney breached the collective bargaining agreement under which Thurlwell was employed. Nothing in our prior decision precluded or is inconsistent with the district court giving special verdict question number three (3), which in pertinent part asked the jury to determine whether Thurlwell was authorized to take a leave of absence.

Further, the district court did not err in denying Thurlwell's motion for judgment as a matter of law or for a new trial. The record contains more than sufficient evidence to support the jury's verdict. Thurlwell's remaining arguments, which for the most part address discretionary evidentiary rulings of the district court, also lack merit. Thurlwell has identified no reason why this

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** The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

*** *Wills v. Walt Disney Pictures and Television*, 97-55420, slip op. (9th Cir. Dec. 17, 1998).

Court should disturb the jury's factual findings or the district court's legal conclusions.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT THURLWELL, Plaintiff, -vs- WALT DISNEY PICTURES & TELEVISION, et al., Defendant(s),	CV 95-5716-DT **JUDGMENT ON THE VERDICT** **(For Defendant)** **AS TO THE BREACH OF COLLECTIVE BARGAINING AGREEMENT CLAIM** (Filed July 26, 2000)

This action came on for jury trial, the Honorable Dickran Tevrizian, Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Robert Thurlwell, take nothing on the complaint against Walt Disney Pictures and Television, defendant, as to the Breach of Collective Bargaining Agreement Claim. Said defendant shall have and recover costs from the plaintiff as awarded as to this claim.

Dated: July 26, 1999

Sherri Carter, Clerk
United States
District Court

By: /s/ Minna Neumaier
Deputy Clerk

cc: Counsel of Record

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. WILLS, an individual, and ROBERT THURLWELL, an individual, Plaintiffs, v. WALT DISNEY PICTURES AND TELEVISION, a corporation; and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, LOCAL #727 (Motion Picture Craft Services), an organization, Defendants.	CASE NO. CV 95 5716 DT (VAPx) **SPECIAL VERDICT FORM** (Filed July 23, 1999)

DUTY OF FAIR REPRESENTATION CLAIM

1. Do you find from a preponderance of the evidence that the IATSE Local 727 (the "Union") breached its duty of fair representation to act on behalf of plaintiff regarding plaintiff's claim against Walt Disney Pictures and Television?

Yes ✓
No ____

If your answer to Question 1 is "Yes," continue by answering Question 2. If your answer to Question 1 is "No," continue by dating, signing and returning this form.

BREACH OF COLLECTIVE BARGAINING AGREEMENT CLAIM

2. Do you find from a preponderance of the evidence that plaintiff did not resign his employment at Walt Disney Pictures and Television to work on "Beverly Hills 90210"?

Yes ✓
No ____

If your answer to Question 2 is "Yes," continue by answering Question 3. If your answer to Question 2 is "No," continue by dating, signing and returning this form.

3. Do you find from a preponderance of the evidence that plaintiff received authorization from Walt Disney Pictures and Television to take a leave of absence in order to work full time on "Beverly Hills 90210" without losing his Disney seniority?

Yes ____
No ✓

If your answer to Question 3 is "Yes," continue by answering Question 4. If your answer to Question 3 is "No," continue by dating, signing and returning this form.

Continue by dating, signing and returning this form.

Dated: 7/23/99

/s/ Judith A. Woodring
Foreperson

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL A. WILLS, an individual, Plaintiff, and ROBERT THURLWELL, an individual, Plaintiff-Appellant, v. WALT DISNEY PICTURES AND TELEVISION, a corporation; INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, LOCAL 727 (MOTION PICTURE CRAFT SERVICES), an organization, Defendants-Appellees, and WAYNE METCALF, an individual; ROGER SHOOKS, an individual, Defendants.	Nos. 99-56774 99-56944 D.C. No. CV 95-5716-DT ORDER (Filed June 22, 2001)

Before: KOZINSKI and TALLMAN, Circuit Judges, and FOGEL, District Judge.*

The panel has voted to deny the petition for rehearing. Judges Kozinski and Tallman have voted to deny the petition for rehearing en banc, and Judge Fogel so recommends.

The full court has been advised of the suggestion for rehearing on banc and no judge has requested a vote on whether to hear the matter en banc. Fed. R. App. 35(b).

The petitions for rehearing and rehearing en banc are DENIED.

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* The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.